

Exhibit A



Department of Energy

Golden Field Office
1617 Cole Boulevard
Golden, Colorado 80401-3393

RECEIVED AUG 24 2012

August 21, 2012

Via United Parcel Service

Ms. Ashley Walkup
Torres Consulting and Law Group, LLC
209 East Baseline Road
Suite E-102
Tempe, AZ 85283

Dear Ms. Walkup:

Subject: Freedom of Information Act (FOIA) Request, Department of Energy
(DOE)/Golden Field Office (GO) Docket No. GO-12-300, Agency Records
Related to Certified Payrolls

This letter is in response to your request under FOIA, pursuant to 5 U.S.C. §552, requesting copies of agency records related to Diamond Fire Protection certified payrolls.

Your Request

- Diamond Fire Protection certified payrolls for the period 24-31 October 2011 and 1-7 November 2011

DOE's Response

In accordance with the Department of Energy's (DOE) regulations implementing the FOIA, 10 C.F.R. 1004.5(b), I am the DOE official responsible for making the initial determination with regard to the disclosure of the information you requested.

No responsive records were found for Diamond certified payrolls for the period 1-7 November 2011. With regard to the certified payrolls for the period 24-31 October 2011, your FOIA request is granted in part and denied in part. Enclosed are 2 pages of responsive documents in fulfillment of your FOIA request. Redacted information is indicated with a "redacted" stamp, and is annotated with the applicable FOIA exemption.

Discussion of Applicable FOIA Exemptions

Exemption 4 (5 U.S.C. § 552(b)(4))

FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Depending upon the circumstances, information provided to the government by third persons may be considered either "voluntarily" or "involuntarily" submitted. Here information contained within the certified payrolls is considered to have been involuntarily submitted.



Under FOIA, involuntarily submitted information is confidential if disclosure is likely to: (1) impair the government's ability to obtain the necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information is obtained. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). See also *Boyce v. U. S. Department of Energy*, Civil Action No. 03-1756, 2005 U.S. Dist. LEXIS 4452 (D.Ct.D.C. March 16, 2005), which upheld DOE's proper reliance on Exemption 4 in withholding contractor documents containing confidential commercial and financial data.

Examples of confidential information that could cause competitive harm, if released, include: data which reveals a company's labor costs; company assets, liabilities and net worth; company's actual costs; break-even calculations; profits and profit rates; workforce data which reveals labor costs; fringe benefits; direct and indirect costs; profit margins; competitive vulnerability; selling prices; purchase activity; freight charges; purchase records; prices paid for advertising; names of consultants and subcontractors; routing systems; cost of raw materials; and pricing strategy.

Here, redacted information consists of confidential labor costs and commercial information contained within the certified payrolls pertaining to the allocation of hours worked and total hours worked weekly (both overtime and standard) on the project. Further, the redacted business financial information consists of individual regular and overtime hours worked, as well as individual gross pay based on regular and overtime hours worked.

Since release of this business and financial information could cause competitive injury to Diamond Fire Protection by a competitor deducing labor costs of the project, this information has been redacted under FOIA Exemption 4. *Westinghouse Electric Corps. V. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. Va. 1976), cert. denied, 431 U.S. 924 (1977).

Further, Diamond Fire Protection has substantial commercial interests in protecting the release of this information, since the public release of this information could be used by competitors to undercut the bid prices of Diamond Fire Protection in the future, resulting in substantial harm to the competitive position of Diamond Fire Protection. *FlightSafety Servs. Corp. v. Dep't of Labor*, No. Civ.A300CV1285P, 2002 WL 368522 *7 (N.D. Tex. 2002).

Exemption 6 (5 U.S.C. § 552(b)(6))

FOIA Exemption 6 protects from disclosure all "personnel and medical files and similar files" when release of that information "would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is intended to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if

privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. (*See Ripskis*, 746 F.2d at 3).

Redactions to the enclosed responsive agency records pursuant to Exemption 6, consist of names and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings. This information is of a personal nature, and disclosure could reasonably result in harassment of the individuals and/or other unwarranted invasions of their personal privacy.

Accordingly, when disclosure of information which applies to a particular individual is sought from Government records, an agency must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. *Washington Post*, 102 S.Ct. at 1961-62. I find that the individuals whose personal information appears in the responsive documents have a privacy interest which would be invaded if the information is released to the public.

It is clear that release of this information would not further the public interest by shedding light on the operations and activities of the Federal Government. Release of the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings would contribute little, if any, to the public's understanding of any matter of public concern.

Because I find a privacy interest in the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings of the public and no public interest in their disclosure, this information has been redacted since its release would constitute a clearly unwarranted invasion of personal privacy.

It is DOE's conclusion that the need to keep this information private outweighs the small public interest gained from its release. For these reasons, this information is exempt from disclosure. *See e.g., U.S. v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Sheet Metal Workers Int'l Ass'n, Local No. 19 v. VA*, 135 F.3d 891, 903-05 (3d Cir. 1998); *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994, 997-98 (10th Cir. 1995); *Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991); and *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991).

Release Summary

Below is a summary of the number of pages you are receiving according to whether the release is in full or partial.

Partial Release

1 pages

Full Release

1 pages

Withheld Entirely

0 pages

Fees

The search, processing and duplication fees for this FOIA request have been waived because these fees were below the minimum recoupment threshold.

Your Right to Appeal

If you disagree with DOE's determination or believe the search has been inadequate, you are entitled to appeal this matter within 30 days of the receipt of this letter by writing to the Director, Office of Hearings and Appeals, HG-1, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585. Both the letter and the envelope must be clearly marked "Freedom of Information Act Appeal."

Once you exhaust your administrative remedies, judicial review of this FOIA request is thereafter available within the district in which you reside, have a principal place of business, where the records are located, or in the District of Columbia.

If you have any questions, please contact Michele Harrington Altieri, FOIA Officer, at 303-275-4770 or by e-mail at michele.altieri@go.doe.gov.

Sincerely,



Carol Battershell
Manager, Golden Field Office

Enclosures (as stated)



Department of Energy

Golden Field Office
1617 Cole Boulevard
Golden, Colorado 80401-3393

RECEIVED AUG 24 2012

August 14, 2012

Via United Parcel Service

Ms. Ashley Walkup
Torres Consulting and Law Group, LLC
209 East Baseline Road
Suite E-102
Tempe, AZ 85283

Dear Ms. Walkup:

Subject: Freedom of Information Act (FOIA) Request, Department of Energy
(DOE)/Golden Field Office (GO) Docket No. GO-12-298, Agency Records
Related to Certified Payrolls

This letter is in response to your request under FOIA, pursuant to 5 U.S.C. §552, requesting copies of agency records related to MTech Mechanical Technologies Group (MTech) certified payrolls.

Your Request

- MTech Mechanical certified payrolls for the period 23-29 January 2012 and 16-22 January 2012

DOE's Response

In accordance with the Department of Energy's (DOE) regulations implementing the FOIA, 10 C.F.R. 1004.5(b), I am the DOE official responsible for making the initial determination with regard to the disclosure of the information you requested.

Your FOIA request is granted in part and denied in part. Enclosed are 107 pages of responsive documents in fulfillment of your FOIA request. Redacted information is indicated with a "redacted" stamp, and is annotated with the applicable FOIA exemption.

Discussion of Applicable FOIA Exemptions

Exemption 4 (5 U.S.C. § 552(b)(4))

FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Depending upon the circumstances, information provided to the government by third persons may be considered either "voluntarily" or "involuntarily" submitted. Here information contained within the certified payrolls is considered to have been involuntarily submitted.



Under FOIA, involuntarily submitted information is confidential if disclosure is likely to: (1) impair the government's ability to obtain the necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information is obtained. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). See also *Boyes v. U. S. Department of Energy*, Civil Action No. 03-1756, 2005 U.S. Dist. LEXIS 4452 (D.Ct.D.C. March 16, 2005), which upheld DOE's proper reliance on Exemption 4 in withholding contractor documents containing confidential commercial and financial data.

Examples of confidential information that could cause competitive harm, if released, include: data which reveals a company's labor costs; company assets, liabilities and net worth; company's actual costs; break-even calculations; profits and profit rates; workforce data which reveals labor costs; fringe benefits; direct and indirect costs; profit margins; competitive vulnerability; selling prices; purchase activity; freight charges; purchase records; prices paid for advertising; names of consultants and subcontractors; routing systems; cost of raw materials; and pricing strategy.

Here, redacted information consists of confidential labor costs and commercial information contained within the certified payrolls pertaining to the allocation of hours worked and total hours worked weekly (both overtime and standard) on the project. Further, the redacted business financial information consists of individual regular and overtime hours worked, as well as individual gross pay based on regular and overtime hours worked.

Since release of this business and financial information could cause competitive injury to MTech by a competitor deducing labor costs of the project, this information has been redacted under FOIA Exemption 4. *Westinghouse Electric Corps. V. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. Va. 1976), cert. denied, 431 U.S. 924 (1977).

Further, MTech has substantial commercial interests in protecting the release of this information, since the public release of this information could be used by competitors to undercut the bid prices of MTech in the future, resulting in substantial harm to the competitive position of MTech. *FlightSafety Servs. Corp. v. Dep't of Labor*, No. Civ.A300CV1285P, 2002 WL 368522 *7 (N.D. Tex. 2002).

Exemption 6 (5 U.S.C. § 552(b)(6))

FOIA Exemption 6 protects from disclosure all "personnel and medical files and similar files" when release of that information "would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is intended to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if

privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. (*See Ripskis*, 746 F.2d at 3).

Redactions to the enclosed responsive agency records pursuant to Exemption 6, consist of names and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings. This information is of a personal nature, and disclosure could reasonably result in harassment of the individuals and/or other unwarranted invasions of their personal privacy.

Accordingly, when disclosure of information which applies to a particular individual is sought from Government records, an agency must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. *Washington Post*, 102 S.Ct. at 1961-62. I find that the individuals whose personal information appears in the responsive documents have a privacy interest which would be invaded if the information is released to the public.

It is clear that release of this information would not further the public interest by shedding light on the operations and activities of the Government. Release of the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings would contribute little, if any, to the public's understanding of any matter of public concern.

Because I find a privacy interest in the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings of the public and no public interest in their disclosure, this information has been redacted since its release would constitute a clearly unwarranted invasion of personal privacy.

It is DOE's conclusion that the need to keep this information private outweighs the small public interest gained from its release. For these reasons, this information is exempt from disclosure. *See e.g., U.S. v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Sheet Metal Workers Int'l Ass'n, Local No. 19 v. VA*, 135 F.3d 891, 903-05 (3d Cir. 1998); *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994, 997-98 (10th Cir. 1995); *Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991); and *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991).

Release Summary

Below is a summary of the number of pages you are receiving according to whether the release is in full or partial.

Partial Release

103 pages

Full Release

4 pages

Withheld Entirely

0 pages

Fees

The search, processing and duplication fees for this FOIA request have been waived because these fees were below the minimum recoupment threshold.

Your Right to Appeal

If you disagree with DOE's determination or believe the search has been inadequate, you are entitled to appeal this matter within 30 days of the receipt of this letter by writing to the Director, Office of Hearings and Appeals, HG-1, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585. Both the letter and the envelope must be clearly marked "Freedom of Information Act Appeal."

Once you exhaust your administrative remedies, judicial review of this FOIA request is thereafter available within the district in which you reside, have a principal place of business, where the records are located, or in the District of Columbia.

If you have any questions, please contact Michele Harrington Altieri, FOIA Officer, at 720-356-1427 or by e-mail at michele.altieri@go.doe.gov.

Sincerely,



Carol Battershell
Manager, Golden Field Office

Enclosures (as stated)



Department of Energy

Golden Field Office
1617 Cole Boulevard
Golden, Colorado 80401-3393

00-34
RECEIVED AUG 14 2012

August 9, 2012

Via United Parcel Service

Ms. Ashley Walkup
Torres Consulting and Law Group, LLC
209 East Baseline Road
Suite E-102
Tempe, AZ 85283

Dear Ms. Walkup:

Subject: Freedom of Information Act (FOIA) Request, Department of Energy
(DOE)/Golden Field Office (GO) Docket No. GO-12-299, Agency Records
Related to Certified Payrolls

This letter is in response to your request under FOIA, pursuant to 5 U.S.C. §552, requesting copies of agency records related to Weifield Group Contracting's certified payrolls.

Your Request

- Weifield Group Contracting's certified payrolls for the period 3-9 October 2011 and 10-16 October 2011

DOE's Response

In accordance with the Department of Energy's (DOE) regulations implementing the FOIA, 10 C.F.R. 1004.5(b), I am the DOE official responsible for making the initial determination with regard to the disclosure of the information you requested.

Your FOIA request is granted in part and denied in part. Enclosed are 12 pages of responsive documents in fulfillment of your FOIA request. Redacted information is indicated with a "redacted" stamp, and is annotated with the applicable FOIA exemption.

Discussion of Applicable FOIA Exemptions

Exemption 4 (5 U.S.C. § 552(b)(4))

FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Depending upon the circumstances, information provided to the government by third persons may be considered either "voluntarily" or "involuntarily" submitted. Here information contained within the certified payrolls is considered to have been involuntarily submitted.



Under FOIA, involuntarily submitted information is confidential if disclosure is likely to: (1) impair the government's ability to obtain the necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information is obtained. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). See also *Boyes v. U. S. Department of Energy*, Civil Action No. 03-1756, 2005 U.S. Dist. LEXIS 4452 (D.Ct.D.C. March 16, 2005), which upheld DOE's proper reliance on Exemption 4 in withholding contractor documents containing confidential commercial and financial data.

Examples of confidential information that could cause competitive harm, if released, include: data which reveals a company's labor costs; company assets, liabilities and net worth; company's actual costs; break-even calculations; profits and profit rates; workforce data which reveals labor costs; fringe benefits; direct and indirect costs; profit margins; competitive vulnerability; selling prices; purchase activity; freight charges; purchase records; prices paid for advertising; names of consultants and subcontractors; routing systems; cost of raw materials; and pricing strategy.

Here, redacted information consists of confidential labor costs and commercial information contained within the certified payrolls pertaining to the allocation of hours worked and total hours worked weekly (both overtime and standard) on the project. Further, the redacted business financial information consists of individual regular and overtime hours worked, as well as individual gross pay based on regular and overtime hours worked.

Since release of this business and financial information could cause competitive injury to Weifield Group by a competitor deducing labor costs of the project, this information has been redacted under FOIA Exemption 4. *Westinghouse Electric Corps. V. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. Va. 1976), cert. denied, 431 U.S. 924 (1977).

Further, Weifield Group has substantial commercial interests in protecting the release of this information, since the public release of this information could be used by competitors to undercut the bid prices of Weifield Group in the future, resulting in substantial harm to the competitive position of Encore Electric. *FlightSafety Servs. Corp. v. Dep't of Labor*, No. Civ.A300CV1285P, 2002 WL 368522 *7 (N.D. Tex. 2002).

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privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. (*See Ripskis*, 746 F.2d at 3).

Redactions to the enclosed responsive agency records pursuant to Exemption 6, consist of names and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings. This information is of a personal nature, and disclosure could reasonably result in harassment of the individuals and/or other unwarranted invasions of their personal privacy.

Accordingly, when disclosure of information which applies to a particular individual is sought from Government records, an agency must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. *Washington Post*, 102 S.Ct. at 1961-62. I find that the individuals whose personal information appears in the responsive documents have a privacy interest which would be invaded if the information is released to the public.

It is clear that release of this information would not further the public interest by shedding light on the operations and activities of the Government. Release of the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings would contribute little, if any, to the public's understanding of any matter of public concern.

Because I find a privacy interest in the names, and individual identifying numbers of workers, and specific information related to overtime, standard time, dates and hours worked, gross earnings, withholding tax, Medicare payments, and net earnings of the public and no public interest in their disclosure, this information has been redacted since its release would constitute a clearly unwarranted invasion of personal privacy.

It is DOE's conclusion that the need to keep this information private outweighs the small public interest gained from its release. For these reasons, this information is exempt from disclosure. *See e.g., U.S. v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Sheet Metal Workers Int'l Ass'n, Local No. 19 v. VA*, 135 F.3d 891, 903-05 (3d Cir. 1998); *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994, 997-98 (10th Cir. 1995); *Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991); and *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991).

Release Summary

Below is a summary of the number of pages you are receiving according to whether the release is in full or partial.

Partial Release
9 pages

Full Release
3 pages

Withheld Entirely
0 pages

Fees

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Your Right to Appeal

If you disagree with DOE's determination or believe the search has been inadequate, you are entitled to appeal this matter within 30 days of the receipt of this letter by writing to the Director, Office of Hearings and Appeals, HG-1, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585. Both the letter and the envelope must be clearly marked "Freedom of Information Act Appeal."

Once you exhaust your administrative remedies, judicial review of this FOIA request is thereafter available within the district in which you reside, have a principal place of business, where the records are located, or in the District of Columbia.

If you have any questions, please contact Michele Harrington Altieri, FOIA Officer, at 303-275-4770 or by e-mail at michele.altieri@go.doe.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'CBW', is written over the typed name.

Carol Battershell
Manager, Golden Field Office

Enclosures (as stated)

Exhibit B



ISRAEL G. TORRES, ESQ.
MARIE LEVIE
JAMES E. BARTON II, ESQ.
ANNA L. CLARK
ASHLEY I. WALKUP, ESQ.

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

September 17, 2012

Director
Office of Hearings and Appeals, HG-1
Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

RE: FREEDOM OF INFORMATION ACT APPEAL

Agency:	Department of Energy ("DOE")/Golden Field Office ("GO")
Project Name:	NREL
Docket No.:	GO-12-299 and GO-12-298
Our Case No.:	CBCTC-34

Dear Director:

This Freedom of Information Act ("FOIA") Appeal is in response to the excessive redactions on certified payroll data received pursuant to a FOIA request. The FOIA process resulted in CBCTC obtaining unusable information and documents because of the substantial redactions and withholdings citing FOIA's Exemption 4 (5 U.S.C § 552(b)(4)). CBCTC believes that the requested information and data that the Department of Energy ("DOE") is withholding under Exemption 4 – has been improperly and incorrectly withheld from disclosure.

TCLG is a consulting firm that oversees compliance on construction projects throughout the United States. We monitor American Recovery and Reinvestment Act stimulus funded projects to determine if the contractors involved are adhering to the rules and regulations required under the Davis-Bacon and Related Acts (DBRA). Through proactive monitoring, TCLG believes that contractors will ensure that employees receive the accurate classification and compensation.

To achieve the goals promulgated under DBRA, TCLG requests pertinent project information, including contract data and certified payrolls, from the appropriate contracting agencies by following FOIA procedures and guidelines. Upon receipt of the requested information, we are able to monitor compliance violations and report these potential situations directly to the Department of Labor, which significantly aids in achieving and raising awareness for DBRA enforcement.

TCLG has had multiple conversations/discussions/correspondence exchanges with DOE in regards to these FOIA Requests. We have provided additional information upon request, narrowed the scope, explained the reasoning behind the information that TCLG

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ISRAEL G. TORRES, ESQ.
MARIE LEVIE
JAMES E. BARTON II, ESQ.
ANNA L. CLARK
ASHLEY I. WALKUP, ESQ.

requested, and generally demonstrated a good-faith effort to develop a working relationship with the DOE that would be productive and efficient on both of sides of the FOIA process.

In response to the FOIA Request, TCLG received documents that contained little useful information due the redaction of a substantial amount of the data. Due to the extreme amount of time that has passed since TCLG submitted the initial and follow-up FOIA Requests, we were afraid that the requested information would be irrelevant – if the projects were completed and paid out, monitoring DBRA compliance and performing the oversight function to ensure compliance on these federally funded construction projects would be moot. Obviously, TCLG is very disappointed in the results obtained from DOE during the FOIA process.

DOE contends that the redacted information withheld under Exemption 4 is considered a trade secret and/or commercial or financial information obtained from a person that is considered privileged or confidential and is protected from disclosure under the FOIA Exemption. In this case, there is no dispute that the information requested is primarily “commercial” and that DOE obtained the information from a “person”, as the courts have defined these requirements. However, CBCTC disagrees with DOE’s determination to consider the information privileged and confidential and ultimately withhold it from disclosure under FOIA.

Courts utilize a two-part test to determine if the withheld information is appropriately considered “privileged or confidential.” Information under the third element of § 552(b)(4) is considered “confidential” if the disclosure will (1) make it harder for the government to obtain similar information in the future or (2) cause substantial competitive harm to the position of the submitter. *Nadler v. FDIC*, 92 F.3d 93, 96 (2d Cir. 1996). DBRA requires that contractors and/or sub-contractors submit certified payrolls for each employee performing work on the construction project in question. The certified payroll records must be submitted to DOE on a weekly basis for every week work is performed on the project. The specific federal construction contracts make DOE responsible for monitoring the requirements of DBRA and to ensure strict compliance with the rules and regulations. Therefore, the first prong of the “privileged or confidential” test does not apply because disclosing the requested information would not make it harder for the agency to gain control of the information in the future because submitting the requested information is mandatory under the federal construction contracts.

The contention then turns on whether or not disclosure of the most important information needed to ensure compliance on DBRA projects, the employee wage rate (hourly and



ISRAEL G. TORRES, ESQ.
 MARIE LEVIE
 JAMES E. BARTON II, ESQ.
 ANNA L. CLARK
 ASHLEY I. WALKUP, ESQ.

fringe benefits), will substantially harm the prime contractor or sub-contractors competitively. CBCTC seeks the release of rate of pay information (hourly and fringe benefits) in order to determine compliance and to determine that they are in fact paying the prevailing wages as mandated to the workers under their employ according to the project's wage determination. Additionally, CBCTC seeks the release of the total hours worked daily and weekly (standard and overtime) in order to determine if overtime is due and appropriately paid to the employee as well as to ensure that stated apprenticeship ratios are met.

Under Exemption 4 certain information is understandably withheld from disclosure such as personally identifiable information of the submitter's employees, non-public government employee names and contact information, and personal signatures. However, the wage data and hours worked is necessary to determine compliance with DBRA should not be arbitrarily withheld due to a general claim under the protection of a FOIA exemption. This is further increased by the fact that the release of the wage rate data (hourly rate and fringe benefits paid per hour) from the certified payroll documents would not cause substantial competitive harm because all contractors are aware of the requirement to pay the prevailing wage rate and benefits as it is stipulated and incorporated into the project contract. Disclosure of the hours worked on a project's job-site should not be protected under Exemption 4 because this information is readily observable on most projects and is the primary way to establish if a contractor complies with apprenticeship guidelines mandated by federal law. The number of hours worked, daily and weekly, for a given employee as stated on the certified payroll records demonstrates that the worker is being paid for every hour worked and that the contractor is not simply using a required base wage rate to back into DBRA compliance. The wage rate, fringe benefits, and apprenticeship guidelines that are stipulated by the contract cannot be considered confidential and the release of the information would not cause a competitive disadvantage to the submitter.

TCLG only requests, on behalf of our clients, the minimum amount of information necessary to determine compliance on a federally funded construction project. The requested wage information is essential in our efforts to monitor DOE's enforcement of DBRA and determine whether prevailing wages are paid, as they are required by law and by the contract wage determination. Once compliant behavior is determined, the case is closed. DOE has determined that the sub-contractors claim to withhold the basic wage information associated with this project would substantially harm them competitively. We respectfully disagree, the project bid is based on many numerous and extremely precise and different elements. Providing a three-week time span for only the trade work performed would not allow a competitor to gain a substantial competitive advantage in pricing future bids, even on exactly similar projects. Additionally, as mentioned above,



ISRAEL G. TORRES, ESQ.
MARIE LEVIE
JAMES E. BARTON II, ESQ.
ANNA L. CLARK
ASHLEY I. WALKUP, ESQ.

the wage rate is known to everyone because the prevailing wage rates are included in the federally funded contract.

Attached to this letter, TCLG has included the following information to assist in your review of the determinations made in regards to this specific FOIA request:

- FOIA Response -- Dated August 14, 2012
- DOE FOIA Response -- Dated August 21, 2012

If you have any questions or concerns regarding this submittal, please do not hesitate to contact me directly. Thank you for your time and your assistance in helping us resolve this issue. I look forward to speaking with you soon.

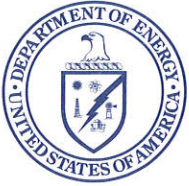
Sincerely,

A handwritten signature in cursive script that reads "James E. Barton II".

Jim Barton
Attorney

Enclosures (as stated)

Exhibit C



Department of Energy

Washington, DC 20585

OCT 19 2012

James E. Barton, II, Esq.
Torres Consulting & Law Group, LLC
209 East Baseline Road, Suite E-102
Tempe, AZ 85283

Re: Case No. FIA-12-0056

Dear Mr. Barton:

The Department of Energy (DOE) has considered the Freedom of Information Act Appeal you filed on behalf of the Torres Consulting and Law Group, LLC, on September 25, 2012. As the enclosed Decision and Order indicates, the DOE has determined that the Appeal, Case No. FIA-12-0056, be denied.

If you have any questions regarding this Decision and Order, please contact Janet R. H. Fishman, Attorney-Examiner, at the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, DC, 20585, telephone number (202) 287-1579.

Sincerely,

A handwritten signature in blue ink, appearing to read "P. Marmolejos", is written over the word "Sincerely,".

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosure





Department of Energy

Washington, DC 20585

United States Department of Energy Office of Hearings and Appeals

In the Matter of Torres Consulting & Law Group, LLC)

Filing Date: September 25, 2012)

Case No.: FIA-12-0056

Issued: **OCT 19 2012**

Decision and Order

On September 25, 2012, Torres Consulting & Law Group, LLC, (Appellant) filed an Appeal from determinations issued to it on August 9, 2012, August 14, 2012, and August 21, 2012, by the Golden Field Office (Golden) of the Department of Energy (DOE) (Request Nos. GO-12-298, GO-12-299, and GO-12-300). In those determinations, Golden released documents responsive to the requests the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Golden withheld portions of the released documents under Exemptions 4 and 6 of the FOIA. This Appeal, if granted, would release the employee wage rates and total hours worked, both daily and weekly, from the documents at issue.

I. Background

On July 31, 2012, the Appellant filed three requests with Golden for certified payroll records pertaining to "MTech Mechanical," "Weifield Group," and "Diamond Fire Protection." Request E-mail dated July 31, 2012, from Ashley Walkup, Appellant, to Michele Altieri, Golden. On August 9, 2012, Golden released the Weifield Group payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 9, 2012, from Golden to Ashley Walkup, Appellant. On August 14, 2012, Golden released the MTech Mechanical payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 14, 2012, from Golden to Ashley Walkup, Appellant. On August 21, 2012, Golden released the Diamond Fire Protection payroll records, but again withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 21, 2012, from Golden to Ashley Walkup, Appellant.

On September 17, 2012, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging only the information withheld under Exemption 4, *i.e.*, the withholding of the employee wage rate and total hours worked both daily and weekly. Appeal Letter dated September 17, 2012, from Jim Barton, Appellant, to Director, OHA, DOE. The Appellant



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argues that release of this information will not allow a competitor to gain a "substantial competitive advantage in pricing future bids, even on exactly similar projects." *Id.* at 3.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemption 4 is at issue in this Appeal.

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

The Appellant is not challenging whether the information withheld, employee wage rate and total hours worked both daily and weekly, is either commercial or financial or obtained from a person. Appeal Letter at 2. We therefore must determine whether the information is privileged or confidential. For the reasons set forth below, we find that the information is confidential and therefore exempt from release under Exemption 4.

In this case, the contractors were required to submit the documents in question as part of their contracts with Golden. Accordingly, we find that the withheld information was "involuntarily submitted." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770. In applying Exemption 4 to the documents at issue, Golden determined that release of the information would likely cause the contractors substantial competitive harm.

The Appellant states that the wage rate data from the certified payroll documents would not cause substantial competitive harm because all contractors are aware of the requirement to pay

the prevailing wage rate and benefits as it is stipulated and incorporated into the project contract. Appeal Letter at 2. In addition, disclosure of the hours worked on a project's jobsite should not be protected under Exemption 4 because this information is readily observable on most projects and is the primary way to establish if a contractor complies with apprenticeship guidelines mandated by federal law. *Id.* Finally, the number of hours worked, daily and weekly, for a given employee demonstrates that the worker is being paid for every hour worked and that the contractor is not simply using a required base wage rate to back into Davis-Bacon Act compliance. *Id.* In sum, the Appellant argues that the wage rate, fringe benefits, and apprenticeship guidelines cannot be considered confidential and the release of the information would not cause a competitive disadvantage to the submitter.

Golden determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information would give the contractors' competitors an undue advantage in bidding on future contracts. Therefore, we find that Golden properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received.

III. Conclusion

After considering the Appellant's arguments, we are convinced that Golden properly withheld the redacted information from the documents under Exemption 4. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-12-0056, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

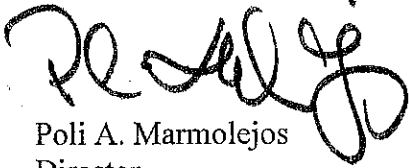
Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov

- 4 -

Telephone: 202-741-5770

Fax: 202-741-5759

Toll-free: 1-877-684-6448

A handwritten signature in black ink, appearing to read 'Poli A. Marmolejos', written over the printed name.

Poli A. Marmolejos

Director

Office of Hearings and Appeals

Date: OCT 19 2012